IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 57158-3-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
HAGOS HAPTE HADGU,	)	
	)	
Appellant.	)	FILED: September 25, 2006

PER CURIAM. Hagos Hadgu appeals his conviction and sentence for one count of first degree rape of a child. Hadgu challenges the trial court's admission of testimony describing uncharged acts under ER 404(b), contends the prosecutor's questioning of an alleged victim about statements Hadgu made constituted misconduct, and argues the court erred by failing to give a proposed limiting instruction. Hadgu further contends the sentencing court erred by concluding his prior Oregon conviction of first degree sexual abuse would constitute a felony in Washington. Hadgu raises additional claims in a pro se supplemental statement of additional grounds for review. We find no error and affirm.

FACTS

In approximately 1997 or 1998, Hadgu became engaged to Yordanos H., who lived with her parents and four sisters. At the time of the engagement, Hadgu was thirty-five years old, Yordanos was eighteen, her sister Y.H. was eight or

nine, and her sister L.H. was seven or eight. Yordanos's parents were Eritrean immigrants and did not speak English well. Hadgu, who had come from Eritrea many years earlier, assisted the parents with his facility with English and became close to the family, spending several nights a week at their house, often sleeping on their couch. In 1999 or 2000, the family moved to a new house. Shortly afterward, his engagement to Yordanos ended.

In 2004, Y.H. told a school nurse that Hadgu had raped her when she was eight or nine years old. She later testified that he began by touching her vagina with his hand and ultimately had vaginal intercourse with her several times. When L.H. was interviewed by police, she described separate incidents during the same period in which Hadgu had kissed her on the mouth and fondled her buttocks. L.H. reported Hadgu attempted to prevent disclosure by threatening to harm her family. The State charged Hadgu with two counts of first degree rape of a child concerning Y.H. and one count of first degree child molestation concerning L.H.

After Hadgu was charged, the State learned of three other alleged victims. In the early 1980's, Hadgu was accused and convicted in Oregon of one count of first degree sexual abuse of K.B., a young girl of unspecified ethnic background who attended a day care operated by a friend of Hadgu's. Also in Oregon in the early 1980's, Hadgu had befriended the Eritrean immigrant parents of then five- or six-year-old S.S., a cousin of Y.H. and L.H. Using his friendship with her family to

facilitate sexual contact with her over several years, Hadgu had begun with placing his hand on her vagina, progressing over time to rubbing his penis on her vagina. S.S. reported Hadgu had attempted to prevent her from disclosing the abuse by threatening her family. Although she ultimately told her parents, S.S.'s family had not filed complaints with the police because of cultural traditions that would find the girl's family shamed. Finally, in 2003, ten-year-old A.G. of Seattle, also of Eritrean heritage, and a member of a family befriended by Hadgu, reported that Hadgu had sexually assaulted her by pinning her on a bed and lying on top of her.

The State provided notice of its intent to introduce evidence of these acts pursuant to ER 404(b). After a pre-trial evidentiary hearing, the trial court excluded evidence of the acts involving K.B. because of insufficient factual similarity and excessive prejudice due to the conviction. The court also excluded evidence of the acts involving A.G. because they were the subject of separate pending charges and the defense in that case had identified an alibi defense. The court admitted evidence of the molestation of S.S., finding the acts were proved by a preponderance of the evidence and were relevant to establish a common scheme or plan, rebutting Hadgu's claims that Y.H. and L.H. had fabricated their claims. The court found striking similarities regarding the nature of the alleged victims and the way Hadgu had maneuvered himself into a position of trust with their families and exploited that position to gain access to the girls

and avoid detection. The court considered factual dissimilarities, weighed the probative value of the evidence against its potential for prejudice, and concluded that the balance was in favor of admission. The court directed that appropriate limiting instructions should be given to minimize prejudice.

During S.S.'s trial testimony, the prosecutor questioned her about a confrontation she had had with Hadgu when she was 22 or 23 years old and had learned of Yordanos's engagement to him. Repeatedly instructing S.S. to refrain from testifying to Hadgu's actual words, the prosecutor asked her about whether Hadgu admitted what he had done to her. There was no objection to the question, but when S.S. began to answer "he admitted it, not towards me, but –", defense counsel interrupted the answer with an objection. The court directed the prosecution to ask another question and the prosecutor moved to another topic. Later, outside the presence of the jury, the court discussed the statement with counsel and suggested defense counsel ask S.S. to confirm on cross-examination that Hadgu had not admitted to molesting her. Counsel did so, and did not ask for the earlier testimony to be stricken, or for the court to grant a mistrial.

Two days later, however, defense counsel asked the court to give a written jury instruction that "[t]he defendant has never made any admissions of sexual abuse." The court concluded that, in its view of the way the testimony was elicited and objected to, the remark was not prejudicial, but nonetheless offered to give a proper curative instruction. The court declined to give counsel's proffered

instruction, however, because it was an improper instruction to the jury on a matter of fact. Counsel did not submit any other proposed instructions.

The jury found Hadgu guilty of one of the two counts of child rape involving Y.H., and not guilty of the other charges. At sentencing, defense counsel challenged the comparability of Hadgu's 1984 Oregon conviction for first degree sexual abuse. After reviewing the relevant authority and documentation of Hadgu's conviction following a trial on stipulated evidence, the trial court concluded the conviction was both legally and factually comparable to the former Washington felony of indecent liberties, and sentenced Hadgu to a standard range sentence calculated by including the Oregon conviction in his offender score. Hadgu appeals.

ER 404(b) Evidence

Hadgu first contends the court erred in allowing S.S. to testify. Under ER 404(b), evidence of misconduct other than the act charged is not admissible to show that the defendant is a criminal type.[1] However, evidence of other misconduct may be admitted for other reasons, such as establishing motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[2] To admit evidence under an exception to ER 404(b), the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify on the record the purposes for which it admits the evidence;

[1] ER 404(b); State v. Brown, 132 Wn.2d 529, 570, 940 P.2d 546 (1997).

[2] ER 404(b); Brown, 132 Wn.2d at 570.

(3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value of the evidence against its prejudicial affect.[3] Admitting evidence under this exception is a matter within the sound discretion of the trial court.[4] The court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.[5]

Hadgu assigns error to the court's decision on the premise that the evidence of the uncharged acts was not "signature-like" in similarity to the charged crimes. When identity is at issue, admission of evidence under ER 404(b) requires proof of "signature-like similarity" between the two crimes.[6] But the issue here was whether there was sufficient evidence of a common scheme or plan to prove that the charged crimes occurred at all. Under these circumstances, it is only required that "the prior bad acts be similar enough to be naturally explained as individual manifestations of an identifiable plan."[7] Though the degree of similarity must be substantial, the "level of similarity does not require that the evidence of common features show a unique method of committing the crime."[8]

The trial court applied the correct test on the record, and concluded that

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[3] State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995).

[4] State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999).

[5] Brown, 132 Wn.2d at 572.

[6] State v. Thang, 145 Wn.2d 630, 644, 41 P.3d 1159 (2002).

[7] State v. DeVincentis, 150 Wn.2d 11, 18, 74 P.3d 119 (2003),

[8] DeVincentis, 150 Wn.2d at 21.

the similarities were striking. The court found that in each case Hadgu ingratiated himself with immigrant Eritrean families containing prepubescent girls who were more proficient in English than their parents were. He used his assistance to the families to place him in a position of trust with the parents and the girls. He spoke to the girls in English, thus psychologically isolating them from their parents, groomed the girls with similar compliments and made similar threats against their families to prevent disclosure. In addition, the court noted that the girls were related, providing another link between the cases. The court acknowledged that S.S., unlike Y.H., did not testify that Hadgu actually ever achieved penetration, but concluded this difference could be understood as a difference only in the stage of a progression of escalating conduct rather than a substantial dissimilarity. We find this reasoning tenable, and therefore conclude the court did not abuse its discretion.[9]

Hadgu contends that culture and ethnicity were irrelevant. Certainly, a trial court must be cautious and sensitive to cultural differences and should not admit evidence of different offenses that are merely similar because of immigrant status or cultural background. Here, however, we are confident the trial court understood the distinction between mere similarities between incidents that could

[9] See DeVincentis, 150 Wn.2d. at 22 (evidence of prior molestation admissible where each incident included a similar pattern of wearing only bikini or g-string underwear, asking the girls whether they minded his undress, asking them to remove their clothes, to give him massages and eventually to masturbate him until he ejaculated and not to tell); Lough, 125 Wn.2d at 850-52 (where defendant charged with drugging victim's drink and raping her, testimony of other women that defendant had done the same thing to them two to ten years earlier admissible).

be attributable to general cultural background and the type of similarities required for admissibility of such evidence.

Hadgu also suggests the evidence was unnecessary because Y.H. and L.H. served to corroborate each other. But, as the trial court expressly noted in balancing probative value against prejudice, there was an issue of reporting delay for each of the girls and there was no physical corroboration. Moreover, Hadgu's defense of fabrication applied to both Y.H. and L.H., rendering the common plan evidence particularly important to the State's case for rebuttal.

The record shows the trial court understood the relevant law and scrupulously applied the correct standards to reach a tenable result. We find no abuse of discretion.

Prosecutorial Misconduct

Hadgu next points to S.S.'s testimony about her confrontation with him, contending the prosecutor committed misconduct by deliberately eliciting inadmissible evidence about other bad acts. A defendant who alleges prosecutorial misconduct must establish that the conduct was both improper and prejudicial.[10] The challenged conduct must be viewed in the context of the entire record.[11] Contrary to Hadgu's claim, the record here is abundantly clear that the prosecutor tried to avoid introducing inadmissible evidence. The incident is properly understood as a trial irregularity rather than intentional misconduct.

[10] State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

[11] Brown, 132 Wn.2d at 561.

And the trial judge, who is in the best position to consider the potential prejudicial effect of a witness's violation of an order in limine,[12] concluded that the remark was likely perceived by the jury as ambiguous, vague, and "lost in the shuffle of the subsequent objection and admonition from the Court." Even considering the incident as a trial irregularity, we do not find reversible error.

Hadgu nonetheless maintains that the trial court compounded the error of the statement by refusing to give his proffered curative instruction. But the trial court correctly concluded that Hadgu had proposed an improper instruction that "matters of fact have been established as a matter of law."[13] Hadgu cannot claim error because the court has no duty to give an erroneous instruction, to rewrite an incorrect instruction, or to give an instruction not requested.[14]

Offender Score

Next, Hadgu challenges the court's calculation of his offender score. We review his challenge de novo.[15] To include prior convictions in an offender score, the State must prove their existence by a preponderance of the evidence.[16] Where criminal history includes out-of-state convictions, the convictions must be classified as felonies under Washington law.[17] To determine if an out-of-state

[12] See State v. Clemons, 56 Wn. App. 57, 62, 782 P.2d 219 (1989).

[13] State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

[14] State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979); State v. Barber, 38 Wn. App. 758, 771, 689 P.2d 1099 (1984).

[15] State v. McCraw, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

[16] State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986).

offense classifies as a Washington felony, the court must first compare the elements of the out-of-state crime to those of applicable Washington criminal statutes. If the elements are not "identical" or if the out-of-state law is broader than the Washington provision, the sentencing court may examine the facts of the offense to determine whether the defendant's conduct would have violated the comparable Washington statute.[18]

Hadgu cites State v. Freeburg,[19] in which this court held the federal bank robbery statute describes a broader offense than the Washington crime of second degree robbery because it lacks the requirement of proof of a specific intent to steal. He contends his Oregon conviction of first degree sexual abuse is similarly not comparable to the 1983 version of Washington's felony of indecent liberties because the Washington crime contained the mental state element of acting knowingly, while the Oregon statute, former ORS 163.425(1), required only that a defendant "subjects" a child to "sexual contact."

Hadgu fails to consider, however, that the Oregon statute's definition of "sexual contact" includes the mental state element of "touching … the sexual or other intimate parts of a person … for the purpose of arousing or gratifying the sexual desire of either party."[20] As discussed at Hadgu's sentencing, and as is

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[17] Former RCW 9.94A.360(3); State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999).

[18] State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998).

[19] 120 Wn. App. 192, 84 P.3d 292 (2004).

[20] Former ORS 163.305(6) (emphasis added).

further established by relevant Oregon case law, this definition creates a knowledge element because a defendant would have to have knowledge of his actions to act with the purpose of arousing or gratifying sexual desire.[21] Accordingly, the crimes are legally comparable and we need not analyze the State's alternative argument based on the underlying facts of the Oregon offense as established by Hadgu's stipulation.

Pro Se Grounds

Finally, in a pro se statement of additional grounds for review, Hadgu claims ineffective assistance of his trial counsel. Hadgu has failed to meet his burden of establishing deficient performance and resulting prejudice because he does not establish how his counsel could have violated Hadgu's right to confrontation by eliciting statements Hadgu himself had made.[22]

Affirmed.

For the court:

[21] See, e.g., State v. Fitch, 47 Or. App. 205, 613 P.2d 1108, 1110 (1980) (State must prove purpose of sexual arousal to prove the crime); State v. McKinstry, 80 Or. App. 325, 722 P.2d 738, 739 (1986) (jury must find defendant had contact with victim for the specific purpose of sexual gratification); State v. Mayer, 146 Or. App. 86, 932 P.2d 570, 573-74 (1997) (mental state of knowledge is implicit in crime of first degree sexual abuse.); C.f. State State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986) (for purposes of ER 404(b) analysis, commenting that criminal intent flows from the act of touching for sexual gratification itself); State v. Lough, 70 Wn. App. 302, 326, 853 P.2d 920 (1993) ("[G]uilty knowledge and criminal intent would always be present in cases involving admitted touching of a child for purposes of sexual gratification."), aff'd, 125 Wn.2d 847, 889 P.2d 487 (1995).

[22] Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984);

Dwyer, J.

Ajid, J.

Ellington, J.